IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

JESSICA GARAY Plaintiff VS. DONNA INDEPENDENT SCHOOL DISTRICT Defendant	§ § § § § § § §	 CIVIL ACTION NO. 7:16-CV-00031 (JURY REQUESTED)

DEFENDANT DONNA INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant DONNA INDEPENDENT SCHOOL DISTRICT and files this its Motion for Summary Judgment and would respectfully show unto the court the following:

I.
SUMMARY JUDGMENT EVIDENCE

Exhibit A: Deposition Excerpts from Plaintiff Jessica Garay

Exhibit B: Records from Donna Independent School District

Exhibit C: Records from Donna Independent School District Police Department

Exhibit D: Records from Donna Independent School District Human Resources Department

Exhibit E: Termination Record for Arturo Castillo Jr.

II.

STATEMENT OF THE CASE

1. Plaintiff brings this suit against Defendant under Title IX alleging that Defendant is liable to Plaintiff for damages because in 2014, former truancy officer Arturo Castillo, Jr. allegedly sought after and sexually violated Plaintiff who is a former student of the Donna ISD.

Defendant denies that it had actual notice of any alleged sexual harassment of Plaintiff by Castillo and that at any time it acted with deliberate indifference to discrimination.

II.
ARGUMENTS AND AUTHORITY

A. Liability Standard for Plaintiff's Claims Under Title IX

2. The Supreme Court has held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 290 (1998). The Supreme Court further held that the "response must amount to deliberate indifference to discrimination." Id. Under this actual notice standard, "the knowledge of the wrongdoer himself is not pertinent to the analysis." Id. at 291. A District's alleged failure to comply with regulations does not establish the requisite actual notice and deliberate indifference. Id. at 292.

3. The Fifth Circuit has also held that "when a teacher sexually abuses a student, the student cannot recover from the school district under Title IX unless the school district actually knew that there was a substantial risk that sexual abuse would occur." Rosa H. v San Elizario Independent School District, 106 F. 3d 648, 652-653 (5th Cir. 1997). In the words used by the Fifth Circuit, "a school district has not sexually harassed a student unless it knows of a danger of harassment and chooses not to alleviate that danger." Id. at 659.

4. "Title IX liability cannot be based on principles of respondeat superior or constructive notice." Moreno v. McAllen Independent School District, 2016 WL 3198159 (S.D. Tex. 2016); *citing* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998). "The deliberate indifference standard is a high one. Actions and decisions by officials that are merely inept,

erroneous, ineffective, or negligent do not amount to deliberate indifference....” Thus, “a school district has not sexually harassed a student unless it knows of a danger of harassment and chooses not to alleviate that danger.” Moreno v. McAllen Independent School District, 2016 WL 3198159 (S.D. Tex. 2016); *citing* Rosa H., 106 F.3d at 659.

5. Defendant contends that no official with authority to address the alleged discrimination and to institute corrective measures on the District’s behalf had actual knowledge of a sexual encounter between Plaintiff Garay and former truancy officer Arturo Castillo, Jr. Defendant further would contend that it was not deliberately indifferent to Plaintiff in any way.

B. There is No Evidence Establishing Actual Knowledge of a Substantial Threat of Sexual Harassment to Jessica Garay.

6. The 5th Circuit has addressed a Title IX complaint involving Donna ISD similar to the complaint raised by Jessica Garay in the case of Lozano v. Donna ISD, 2016 WL 2848586 (5th Cir. 2016). In that case, the 5th Circuit discussed: “In her original complaint, Lozano failed to plead facts showing that Donna ISD had actual knowledge that students, such as Lozano, faced a ‘substantial threat of sexual harassment’ beyond her conclusory statement that the school district ‘either knew or had constructive knowledge of [the teacher's] past history of improper sexual conduct with female students.’” Lozano, 2016 WL 2848586 at 2; *quoting* Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) as holding: (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Further, in the case of Kelly v Allen ISD, 602 Fed.Appx 949, 953 (5th Cir. 2015), when analyzing the actual knowledge requirement of a Title IX action, the 5th Circuit stated that “The undisputed facts in the record lead to the conclusion that Allen ISD had no knowledge of facts that would permit the inference that **C.K. faced** a substantial risk of serious harassment, and that no Allen ISD official in fact drew such an inference.” (emphasis added).

7. "For a school district to face Title IX liability, it must have had actual knowledge of harassment; constructive notice will not suffice." Id. *citing* Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). Plaintiff has no evidence that Donna ISD, through an official with authority to address alleged discrimination and to institute corrective measures on the District's behalf, had actual knowledge of any sexual harassment involving Plaintiff Garay or about any sexual harassment by Arturo Castillo, Jr. and then subsequently failed to take action after acquiring such knowledge. Accordingly, Defendant contends it is entitled to summary judgment as a matter of law with respect to Plaintiff's Title IX claims.

C. The Evidence Shows That Defendant Had No Actual Knowledge of a Sexual Relationship Between Plaintiff and Arturo Castillo, Jr.

8. No evidence exists to establish the required element of Plaintiff's cause of action under Title IX regarding Defendant's actual knowledge of a sexual relationship between Plaintiff and its former employee. To the contrary, Defendant's summary judgment evidence establishes otherwise as follows:

Plaintiff had no problems while working as an athletic trainer at her high school in Donna. (Please see Exhibit A pg. 23 line 23 to pg 24 line 3);

Plaintiff first met former truancy officer Arturo Castillo, Jr. in the first semester of her junior year because she was skipping too much and had too many absences. (Please see Exhibit A pg. 41 line 23 to pg 42 line 16);

Castillo did nothing more at that time than tell Plaintiff not to miss class. (Please see Exhibit A pg. 44 line 20 to pg 45 line 15);

Castillo then began "helping" Plaintiff with her attendance during her junior year (Please see Exhibit A pg. 46 line 20 to pg 47 line 22);

Plaintiff would skip class by going to Castillo's office with her friends Angie and Yari during school and he would change her absences to tardies on the computer. (Please see Exhibit A pg. 49 line 24 to pg 50 line 13; and pg 52 line 11 to pg 53 line 18);

Castillo changed Plaintiff's absences to tardies somewhere around 30 times. (Please see Exhibit A pg. 53 line 19 to pg 54 line 9);

Plaintiff never told anyone about Castillo changing her attendance records. (Please see Exhibit A pg. 54 line 22 -23);

At the end of her junior year of high school (2014), Castillo and Plaintiff began texting each other. (Please see Exhibit A pg. 57 line 12 to pg 58 line 5);

The only people who knew Plaintiff was texting with Castillo were her two friends and they told no one else. (Please see Exhibit A pg. 62 line 7-13; pg 73 line 8-13);

Castillo and Plaintiff texted each other from the end of May 2014 through August 2014. (Please see Exhibit A pg. 62 line 20 to pg 63 line 16);

During the time they texted, Castillo texted a naked picture of himself to Plaintiff and Plaintiff texted two or three pictures to him of herself in a bra and underwear. (Please see Exhibit A pg. 64 line 3-17 and pg 67 line 7-16);

Plaintiff did not tell anyone about the pictures Castillo texted her until she was interviewed by police after her outcry. (Please see Exhibit A pg. 64 line 18-21);

Even Plaintiff's friends did not know she was exchanging pictures with Castillo because she did not share that information with anyone. (Please see Exhibit A pg. 68 line 19 to pg 69 line 10);

Outside of Summer, Castillo only texted Plaintiff about her boyfriend, school, absences and that he would help her with absences. (Please see Exhibit A pg. 69 line 11-25);

Plaintiff never spoke to other students or administrators about Castillo. (Please see Exhibit A pg. 70 line 15-23);

Plaintiff testified that her cousin, a security guard named Galvan and some coaches she did not know the names of allegedly knew she and Castillo had a sexual encounter. (Please see Exhibit A pg. 74 line 2 to pg 76 line 10);

Castillo texted Plaintiff asking her to have sex but Plaintiff told no one. (Please see Exhibit A pg. 77 line 1 to pg 79 line 17);

Plaintiff and Castillo had sex in a hotel on July 20, 2014. (Please see Exhibit A pg. 79 line 23 to pg 80 line 3; pg 83 lines 14-20);

Plaintiff had no other sexual encounters of any kind and no physical contact of any kind with Castillo. (Please see Exhibit A pg. 84 line 22 to pg 85 line 11);

9. Defendant submits that to recover in her claim against Defendant, Plaintiff must show that Defendant had actual knowledge of the harassment of Plaintiff Garay and then acted with

deliberate indifference to the information. Gebser, 524 U.S. at 290. Defendant's Summary Judgment evidence conclusively establishes that no official from Donna ISD with authority to address alleged discrimination and to institute corrective measures on the District's behalf had actual knowledge of any sexual harassment of Plaintiff by Castillo before it was reported to Principal Cacares. Accordingly, Defendant would respectfully request that summary judgment be granted in favor of Defendant with respect to all of Plaintiff's claims.

D. No Employee With Supervisory Power Over Arturo Castillo, Jr. Was Deliberately Indifferent

10. "An employee with supervisory power is a school official 'in a position with the authority to repudiate [abusive] conduct and eliminate the hostile environment on behalf of the school district'" Moreno v. McAllen Independent School District, 2016 WL 3198159 (S.D. Tex. 2016); *citing* Rosa H., 106 F.3d at 661 (internal quotation marks and citation omitted) (emphasis in original). "The Fifth Circuit's holding omits 'the bulk of employees, such as fellow teachers, coaches, and janitors unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse.'" Id. *citing* Rosa H., 106 F.3d at 660. The following summary judgment evidence outlines the chronology of how this matter was reported to the appropriate District official (Principal Cacares) and what was done after she was made aware of the incident between Plaintiff and Castillo:

Plaintiff first told a teacher for special ed named Lugo who used to be her coach about her having sex with Castillo. (Please see Exhibit A pg. 91 line 12-20);

According to Plaintiff, she told Lugo not to tell anyone and he said he would not tell anyone. (Please see Exhibit A pg. 94 line 21 pg 95 line 4);

The next person who knew about Plaintiff's relationship with Castillo was soccer coach Priscilla Campos who was told by Plaintiff's friend after Castillo and Plaintiff had sex. (Please see Exhibit A pg. 95 line 5-21);

The next and final adult to be told about Castillo having a relationship with Plaintiff was Coach Francisco Martinez who was told by Plaintiff after she and Castillo had sex. (Please see Exhibit A pg. 101 line 7-22);

High School Principal Bernadett Cacares was first made aware of Plaintiff's encounter with Castillo on October 22, 2014. (Please See Exhibit B pgs 2 and 13);

Principal Cacares pulled Plaintiff out of class, interviewed her, took notes and told her she was going to notify the police. (Please see Exhibit A pg. 112 line 14 to pg 114 line 22 and pg 115 line 2 to 117 ln 25);

On October 22, 2014, Principal Cacares prepared a detailed seven page account of what Plaintiff reported to her during her interview with Plaintiff. (Please See Exhibit B pgs 2-8);

Principal Cacares told plaintiff she would have to tell Plaintiff's mother about what happened and then escorted Plaintiff to campus police officers. (Please see Exhibit A pg. 117 line 9-19);

On the day Principal Cacares was first made aware of the encounter between Plaintiff and Castillo (October 22, 2014), she interviewed Arturo Castillo, Jr. and recommended to then Assistant Superintendent of Human Resources Debbie Scoggins that Arturo Castillo, Jr. be suspended pending an investigation into the allegations against him. (Please See Exhibit B pg. 13);

On October 23, 2014, Arturo Castillo, Jr. was suspended by Debbie Scoggin without pay pending the outcome of an investigation. (Please See Exhibit B, pg 14);

On October 23, 2014, Principal Cacares utilized the Texas Abuse, Neglect and Exploitation Reporting System to report this matter to the Texas Department of Family and Protective Services. (Please See Exhibit B pgs 9-12);

On October 23, 2014 the Donna ISD police Department began an investigation into Arturo Castillo, Jr. (Please see Exhibit C);

On October 24, 2014, the Donna ISD Human Resources Department continued the investigation into this event by interviewing Arturo Castillo, Jr., Francisco Martinez, Priscilla Campos, Yaritza Barcenas, Angelica Rocha, and Jessica Garay. (Please See Exhibit D);

On October 27, 2014, Donna ISD notified the Texas Education Agency of the investigation into this incident. (Please See Exhibit B pg 15);

On January 14, 2015, Donna ISD terminated the employment of Arturo Castillo, Jr. (Please See Exhibit E).

11. Defendant concedes that as a principal of the high school where Plaintiff attended, Bernadett Cacares was an official with authority to address alleged discrimination and to institute

corrective measures on the District's behalf regarding truancy officer Arturo Castillo, Jr. No other person Plaintiff allegedly reported these events to would constitute an official with authority under Title IX. *See* Rosa H., 106 F.3d at 660. It is uncontrovertible that Principal Cacares was not made aware of any encounter between Plaintiff and Arturo Castillo, Jr. until October 22, 2014.

12. Defendant's summary judgment evidence establishes that rather than acting with deliberate indifference Principal Cacares immediately interviewed Plaintiff, began an investigation and instituted a process to suspend Arturo Castillo, Jr. Within one day of the report to Principal Cacares, Arturo Castillo, Jr. was suspended and removed from any contact with students, the Texas Department of Family and Protective Services was made aware of the situation, and the Donna ISD police department began its investigation into Arturo Castillo, Jr. The District's investigation involved interviews with multiple witnesses and resulted in the termination of Plaintiff. Accordingly, Defendant would respectfully submit that Plaintiff cannot establish that the Donna Independent School District was deliberately indifferent in response to actual knowledge of harassment of Jessica Garay and therefore is entitled to summary judgment.

13. WHEREFORE, PREMISES CONSIDERED, Defendant DONNA INDEPENDENT SCHOOL DISTRICT prays that Plaintiff take nothing from this suit, that its Motion for Summary Judgment be granted, that it recovers its court costs and attorneys fees associated with prosecuting this matter, and that the court grant it such other and further relief to which they may be entitled to, either at law or in equity.

Signed on December 7, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2016, pursuant to the Federal Rules of Civil Procedure, a true and correct copy of the above and foregoing document was served on each party to this action by Defendant's submission of this document to the U.S. District Court electronically to the DCECF system.

/s/ Eduardo G Garza
Eduardo G Garza

CERTIFICATE OF CONFERENCE

As this pleading involves a dispositive motion, there is no requirement for conference with respect to this motion.

/s/ Eduardo G Garza
Eduardo G Garza